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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM POPELKA, GARY MUELLER,

and DON ANDERSON,

Petitioners,

v.

ERIC LEE AND THE GENERAL SERVICES ADMINISTRATION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Merit Systems Protection Board had jurisdiction to determine whether the Petitioners, as Veterans Readjustment Act (VRA) appointees, were unlawfully terminated?

2. Whether VRA appointees can be deprived of their interests in continued employment with the General Services Administration (GSA) without an administrative hearing or any other opportunity to present their claims?

3. Whether the Civil Service Reform Act (CSRA) violates due process guarantees if its application deprives federal employees of any forum in which to present constitutional claims?

PARTIES TO THE PROCEEDING BELOW

The Petitioners sought review to the United States District Court for the District of Montana of the wrongful termination of their employment with the General Services Administration (GSA). The District Court held that it had no jurisdiction and dismissed the case. That decision was affirmed by the United States Court of Appeals for the Ninth Circuit.

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The Petitioners respectfully request that this Court grant a petition for writ of certiorari, seeking review of

the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.[1]

DECISIONS BELOW

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1 The Petitioners have also filed, contemporaneously herewith, a petition for writ of certiorari, seeking review of a conflicting judgment and opinion from the United States Court of Appeals for the Federal Circuit. Both petitions are related and present the same issues.

Appendix

Anderson, Popelka and Mueller v. General Services Administration, MSPB Docket No. DE344392045II1, Opinion and Order (January 29, 1993) 24-32

Anderson, Popelka, and Mueller v. Merit Systems Protection Board, No. 93-3219, ____ F.3d ____ (Fed.Cir. Dec. 16. 1993) 33-43

JURISDICTION

The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit entered judgment in this case on February 11, 1994. See Appendix 1-6. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

38 U.S.C. § 4214(a)(1) provides as follows:

> The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life since veterans, by virtue of their military service, have lost opportunities to pursue education and training oriented toward civil careers. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a major recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for disabled veterans and certain veterans of the Vietnam era and of the post-Vietnam era who are qualified for such employment and advancement.

38 U.S.C. § 4214(b)(1)(E) provides as follows:

> [A] veteran given an appointment under the authority of this subsection whose employment under the appointment is terminated within one year after the date of such appointment shall have the same right to appeal that termination to the Merit Systems Protection Board as a career or career-conditional employee has during the first year of employment.

STATEMENT OF THE CASE

During late 1989 and early 1990, three of the eight full-time custodial positions at the Federal Building in Billings, Montana became vacant. The GSA sought to fill those vacancies with Vietnam combat veterans who were preference eligible under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. The three Petitioners were the only applicants who qualified for VRA appointments.[2] As the three custodial vacancies constituted full-time positions, the GSA was prohibited by its own written personnel policies from filling those positions with "temporary" employees.

The three Petitioners were subsequently hired by the GSA to fill those three full-time custodial vacancies. The Petitioners were explicitly informed and the GSA affirmatively led them to believe that their custodial jobs with the GSA were VRA appointments, and that they

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2 By statute, custodial positions with the Government are specifically restricted to preference eligible employees. See 5 U.S.C. § 3310. The three custodial vacancies involved here had previously been filled by permanent VRA appointees.

could not be terminated except for reasons related to job performance. Despite the fact that they performed their custodial work in an exemplary manner, and received salary increases and monetary bonuses in recognition of their excellent job performances, the GSA nonetheless notified the Petitioners, shortly before their two-year anniversary dates, that they would be terminated from their positions. The notices provided the Petitioners with no reason for their terminations, other than, in the view of the GSA, they were "temporary" employees.

On February 27, 1992, the Petitioners instituted an action in United States District Court for the District of Montana seeking preliminary injunctive and mandamus relief. The Petitioners subsequently amended their Complaint to allege, in addition to a constitutional tort claim, that the GSA was equitably estopped from contending that they were other than VRA appointees, and sought declaratory relief to that effect. In granting the Government's motion to dismiss for lack of jurisdiction,

the district court cited the MSPB as the appropriate forum for Petitioners' complaints. See Appendix 19.

The Petitioners filed a motion for relief from the district court's judgment. In that motion, the Petitioners' attorneys notified the district court that they had contacted the Office of Special Counsel (OSC) for the MSPB, and had been informed that the MSPB would not assert jurisdiction over their claims. See, e.g., Cinnamon v. FAA, 10 MSPR 598 (1982). It was argued, therefore, that unless the district court exercised jurisdiction in this matter, the Petitioners would be deprived of a forum in which to present their claims. The district court denied the motion. See Appendix 21-23.

The Petitioners then sought review by the MSPB, and the Government again moved to dismiss for lack of jurisdiction. The MSPB held that it had jurisdiction to review agency decisions to terminate "employees" as that term is defined in 5 U.S.C. § 7511(a)(1), but that because the GSA had designated the Petitioners "temporary" on

their SF-50 forms, they were not employees over whom the MSPB had jurisdiction. See Appendix 27-29.

The Petitioners appealed the MSPB's decision to the United States Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9). The Federal Circuit affirmed the MSPB ruling that it had no jurisdiction of the Petitioners' claims. See Appendix 33-43. In so doing, however, the Federal Circuit strongly indicated that the Petitioners should be entitled to some forum in which to present their grievances:

> It is important to understand what is at issue here. The question before us is not whether the Government behaved in a way that entitles these Petitioners to redress; the question is only whether, if redress is to be sought, Congress has authorized the MSPB to provide it.

Appendix 42 (emphasis added).

During the course of appealing the MSPB ruling to the Federal Circuit, the Petitioners were similarly appealing the dismissal judgment of the United States

District Court for the District of Montana to the U.S. Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1291. The Ninth Circuit affirmed the district court's dismissal of Petitioners' claims for lack of jurisdiction. See Appendix 1-6. In its memorandum decision, however, and contrary to the decision which had previously been rendered by the Federal Circuit Court of Appeals, the Ninth Circuit indicated in a footnote that the MSPB would have jurisdiction over Petitioners' claims. See Appendix 5-6 n.2.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit Court of Appeals Has Rendered a Decision Which Directly Conflicts with a Previous Decision of the Federal Circuit Court of Appeals on the Same Matter.

Relying exclusively upon the "temporary" designation which the GSA had inappropriately inserted on Petitioners' SF-50 forms, the MSPB determined that it

lacked jurisdiction over their claims.[3] The Petitioners timely appealed that decision. Pursuant to 5 U.S.C. § 7703(b)(1) and 28 U.S.C. § 1295(a)(9), the U.S. Court of Appeals for the Federal Circuit had exclusive jurisdiction over appeals from final decisions of the MSPB. Although it strongly indicated that some forum should be made available, the Federal Circuit conclusively determined in a published opinion that the MSPB had no jurisdiction to address the Petitioners' claims. A copy of the Federal Circuit's opinion was provided by the Petitioners to the U.S. Court of Appeals for the Ninth Circuit.

Despite the clear decision by the Federal Circuit that the MSPB lacks jurisdiction in this matter, the Ninth

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3 Such reliance was wholly inappropriate. In Grigsby v. U.S. Dept. of Commerce, 729 F.2d 772, 776 (Fed.Cir. 1984), the Federal Circuit determined that "the SF-50 is not a legally operative document controlling on its face an employee's status and rights."

Circuit decided that jurisdiction over Petitioners' claims would be proper with the MSPB.[4]

Consequently, there are decisions rendered by two U.S. Courts of Appeal on the very same jurisdictional matter which are directly contrary to one another. The Federal Circuit says that the MSPB lacks jurisdiction over Petitioners' claims, and the Ninth Circuit disagrees. On this basis, and pursuant to Rule 10 of the Rules of the Supreme Court, an exercise of this Court's power of supervision is clearly warranted.

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4 The Ninth Circuit opined that the Petitioners' grievances sounded in the nature of "prohibited personnel practices," and that the Office of Special Counsel (OSC) was authorized to bring such actions before the MSPB. See Appendix 42-43 n.2 The Government had made this very same argument to the Federal Circuit during the course of the Petitioners' appeal there from the MSPB dismissal. The Petitioners pointed out that, like any other party, the OSC has the burden of establishing MSPB jurisdiction, see, e.g., Special Counsel v. Peace Corp, 31 MSPR 225 (1986); Acting Special Counsel v. Dept. of Treasury, 6 MSPR 140 (1981), and that 5 U.S.C. § 2302(b) does not provide an independent source of MSPB jurisdiction. See Wren v. Department of the Army, 2 MSPR 1, 2 (1980), aff'd, 681 F.2d 867, 871-73 (D.C.Cir. 1982). Thus, while obviously aware of the procedures by which claims can be pursued to the MSPB by the OSC, the Federal Circuit nevertheless determined that the MSPB simply does not have jurisdiction in this matter.

B. The Petitioners are Entitled as a Matter of Due Process to a Forum in Which to Present Their Grievances.

The Petitioners are undoubtedly entitled to present their grievances to some administrative or judicial forum. Even the conflicting decisions from the two U.S. Courts of Appeal involved here would seemingly agree on that fundamental aspect of due process. The problem here, however, is that every administrative agency or court in which the Petitioners have sought redress has denied them a forum.

As the Petitioners have alleged throughout this case, they were informed and the GSA affirmatively led them to believe that they had been appointed to their custodial positions under the Veterans Readjustment Act (VRA), 38 U.S.C. § 4214. As VRA appointees, the Petitioners were serving a probationary period which, after two years of substantially continuous service, the GSA was required to convert to permanent career positions. See 5 C.F.R. § 315.705(a)(2). The GSA is required to utilize this probationary period to determine an

employee's fitness for continued employment, see 5 C.F.R. § 315.803, and is prohibited from terminating an employee during that time except for unsatisfactory performance or conduct. See 5 C.F.R. § 315.804. Moreover, VRA appointees are statutorily entitled to appeal their terminations to the MSPB. See 38 U.S.C. § 4214(b)(1)(E).

It has been well settled for over two decades that an individual may have a property interest in government employment protected by the fifth amendment. See Board of Regents v. Roth, 408 U.S. 564, 577-78, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). To have a property interest in government employment, the employee must be able to demonstrate an entitlement to the job. Entitlements arise from "'rules or understandings' from independent sources, such as statutes, regulations, and ordinances, or express or implied contracts." Orloff v. Cleland, 708 F.2d 372, 377 (9th Cir. 1983)(quoting Board of Regents v. Roth, 408 U.S. at 577). To find an entitlement to a job based on an "understanding," the

understanding must be "mutually explicit," and may be implied from "the [defendants'] words and conduct in the light of the surrounding circumstances." Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Whether or not such an understanding exists "will frequently turn on factual questions." Roth v. Veteran's Administration, 856 F.2d 1401, 1409 (9th Cir. 1988)(citing Orloff v. Cleland, supra, 708 F.2d at 377).[5]

The Petitioners have continuously alleged in every administrative and judicial tribunal in which they have sought redress, that the GSA's conduct and treatment of them and other custodial employees, their salary increases and monetary bonuses for exceptional job performances,

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5 The Supreme Court has established that even as probationary employees, the Petitioners could still have property interests in their custodial jobs if they had expectations of continued employment. See Board of Regents v. Roth, supra, 408 U.S. at 577(citing Connell v. Higginbotham, 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971)(holding that teacher without tenure enjoyed due process rights). See also Orloff v. Cleland, supra, 708 F.2d at 377 (remanding to district court for findings on existence of mutually explicit understanding that part-time VA employee had expectation of continued employment).

and discussions with their supervisors all created a mutually explicit understanding of continued employment. See, e.g., Orloff v. Cleland, supra, 708 F.2d at 377 (prior treatment of plaintiffs and other VA employees may give rise to mutual understanding sufficient to constitute a *de facto* property interest). If there was such an understanding, the Petitioners had a clearly established right to retain their jobs pursuant to that understanding, unless the GSA provided them with due process. At the very least, and in light of the Petitioners' allegations, they are clearly entitled to a hearing so that the merits of their claims can be addressed:

> In this case, the respondent has alleged the existence of rules and understandings . . . that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement . . .

Perry v. Sindermann, supra, 408 U.S. at 602-03 (emphasis added).

The problem in this case, of course, is that the Petitioners have not been given the opportunity to prove their claim of entitlement to continued employment. Every administrative and judicial forum to which they have turned have refused them jurisdiction. Consequently, as such rulings have deprived the Petitioners of their right to pursue their due process claims, an exercise of the Supreme Court's power of supervision in this matter is mandated.[6]

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6 The Supreme Court has never held that the administrative scheme created by the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978)(codified, as amended, in various sections of 5 U.S.C.) can operate to deprive federal employees of any forum in which to present employment-related claims. See Bush v. Lucas, 462 U.S. 367, 391, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)("[T]here is nothing in today's decision to foreclose a federal employee from pursing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the [CSRA]") (Marshall, J. concurring); United States v. Fausto, 484 U.S. 439, 455, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988)(implying that a federal employee could maintain a *Bivens* action despite the CSRA under certain circumstances)(Blackmun, J., concurring); see also Saul v. United States, 928 F.2d 829, 837 (9th Cir. 1991)("No Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing *Bivens* actions to

CONCLUSION

The Petitioners have been deprived of their interest in continued employment with the GSA by a scheme which can only be characterized as fraudulent. They have attempted to seek redress in a federal district court, in the Merit Systems Protection Board, and in two federal Circuit Courts of Appeal. Although recognizing that a forum should be available, none of these courts or administrative agencies will provide the Petitioners with jurisdiction.

Based on the foregoing, the Petitioners respectfully request that this Court grant the petition for writ of certiorari and resolve this jurisdictional dilemma. If this jurisdictional dilemma is not resolved, the GSA will obviously continue to violate with impunity the rights of other federal employees, knowing that such employees

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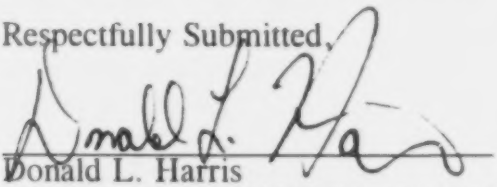
right job-related wrongs"). Indeed, and as the Supreme Court has steadfastly recognized, "'serious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988)(citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986))(emphasis added).

will never be able to seek redress. In the alterative, and should the CSRA operate to deprive federal employees of a forum in which to present colorable constitutional claims, the Act should be declared unconstitutional.

Respectfully Submitted,



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